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United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1944

No. 266

WILLIAM ALFRED LUCKING and
MARGARET HOLMES DAVIS,
Petitioners and Plaintiffs Below,
vs.
FIRST NATIONAL BANK-DETROIT, a National
Banking Corporation, and
NATIONAL BANK OF DETROIT, a National
Banking Corporation,
Respondents and Defendants Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

WILLIAM ALFRED LUCKING,
Ford Building,
Detroit 26, Michigan,
Attorney for Petitioners.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit 26, Mich.

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Respondents and Defendants Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

To: The Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioners respectfully show:

SUMMARY STATEMENT OF QUESTIONS INVOLVED

A. Lack of Jurisdiction—

(1) Can *resident* defendants remove from the State Court—*unless* plaintiffs' complaint shows a Federal Question Involved?

(2) Plaintiffs submit "no"—on the authority of

Gully v. First National Bank, 299 U. S. 109.

(3) The Honorable Sixth Circuit Court of Appeals misconstrued, it appears, *Gully v. Bank, supra,* to permit resident defendants to remove a State Court cause—if the complaint asked a recovery beneficial to a closed National Bank's creditors or stockholders.

In other words—the Court of Appeals, in sustaining removal, held that if moneys recovered in a simple accounting suit went eventually to a National Bank Receiver for distribution—

there resulted an action "for the winding up of the affairs" of a National Bank and thus making the State Court cause removable. That this was so even though Plaintiffs' complaint showed only State contract law and general accounting relief involved, and thus the complaint admittedly showed an entire absence of any action "arising under the Constitution or Laws of the United States",

within this Court's rule announced in *Gully v. First National Bank, supra.*

(4) The Lower District Court refused to remand the cause to the State Court on the authority of *Dinan v. First National Bank,* 117 Fed. (2d) 459.

The *Dinan Case* is the only case ever decided by the Sixth Circuit Court of Appeals where removal by a *resi-*

dent defendant was permitted in a case where no Federal Question was involved.

The briefs in the *Dinan case* in the Court of Appeals did not raise the question here raised, and the Court of Appeals seemingly fell into error in affirming the removal—

on the erroneous assumption that all cases of which the Federal District Courts were given original jurisdiction by Title 28, Section 41, U. S. C. A. could be removed by a *resident defendant,* when started originally not in the Federal Court, but in a State Court.

In affirming removal in the *Dinan case*—the Court of Appeals apparently overlooked entirely its opinions in

Venner v. Railroad, 293 Fed. 373;
Louisville, etc. R. R. v. Mottley, 211 U. S. 149;

holding the contrary—and also overlooked this Court's opinion in

Tennessee v. Bank, 152 U. S. 454.

(5) But this Court granted Certiorari in the *Dinan* case (314 U. S. 593) and a settlement was made out of Court and the Writ dismissed on the Dinans' petition—see 315 U. S. 824.

(6) In the District Court—in the *Dinan* case the plaintiff sued a closed National Bank for damages for breach of a lease and was enjoined by District Judge Arthur F. Lederle from proceeding further in the State Court—

But in the case at bar—the same District Judge (Hon. Arthur F. Lederle) dismissed with prejudice the defendants' Federal Court Injunction suit seeking to restrain the plaintiffs from further proceedings in the State Courts,

(R. 109) and no appeal was taken by the removing resident defendant Banks.

(7) Out of deference to the Court of Appeals' judgment entered April 21, 1944 (see opinion in 142 F. (2d) 528) in the case at bar sustaining the removal and refusing a remand—plaintiffs have not proceeded further in the State Court—awaiting this Honorable Supreme Court's possible issuance of its Writ.

Should the Writ not be issued—then Plaintiffs may proceed in the State Court, leaving final determination of this question of jurisdiction by this Court—on a review of the final judgment in this cause by the Supreme Court of Michigan.

(8) But a review of this important jurisdictional question here raised—by a writ issued upon this petition—would finally determine whether the Sixth Circuit Court of Appeals was right in its decision in *Venner v. R. R. supra,* or in the case at bar.

Thus a final decision by this Court would prevent any possible misconception in other Circuits of this Court's ruling in *Gully v. Bank, supra,* arising. For it seems obvious the opinion of the Court of Appeals in the case at bar conflicts with the *Gully* case opinion—and if this Honorable Court denies its Writ of Certiorari on this petition—all Circuit Courts of Appeal may have some doubt whether

Resident Defendants may remove from State Courts on grounds *other than* the "presence" of a Federal Question —shown by the complaint—(and as required by the *Gully* case opinion, see pages 114 and 115 of 299 U. S.) where it is stated:

"1. The suit is built upon a contract which in point of obligation has its genesis in the law of Mississippi. A covenant for a valuable consideration to pay another's debts is valid and enforceable without reference to a federal law. * * *

Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. * * *"

For a full discussion of *Gully v. Bank, supra,* see the Brief in support of this Petition.

B. The Dismissal on the Merits.

(1) Plaintiffs—in a prior class suit—originally commenced in the Federal Court—asked relief from a purchaser National Bank, on the ground that the Conservator appointed under Act of Congress had no authority to sell the assets of a closed National Bank, before a determination of insolvency by the Comptroller.

This first suit was dismissed (117 Fed. (2d) 159) on the ground that Plaintiffs had not made a *prior demand* upon the closed National Bank's Receiver (who had neglected for over five years to obtain the accountings of profits from the purchaser Bank specifically provided for by the sales contract) to bring the suit for accounting.

(2) After written prior demand—a second accounting suit was brought originally in the Federal Court at Detroit —setting forth the same cause of action against the purchaser bank.

This second suit was dismissed (129 Fed. (2d) 283) on the ground that Plaintiffs had not properly educated the Receiver and his attorneys how to bring the accounting suit—although the Receiver admitted (by his motion to

dismiss) his attorneys had prepared this sales contract, and that it specifically required accountings of profits by the Purchaser Bank and that he, as Receiver, had failed for over five years to require such accountings.

(3) The suit at bar was thereafter brought originally in the State Equity Court—for the accounting of profits required by the sales contract—but admitting the validity of the contract—and thus

making no claim (as in the first two suits) that under any Act of Congress the sale of assets was invalid.

NOTE: In the first case—the Federal District Court, Hon. Hiram Church Ford of Kentucky, presiding, had held Plaintiffs' Complaint sufficient for an accounting of profits —but that failure to make prior demand on the admittedly delinquent Receiver—was fatal, on motion to dismiss—for the Opinion see Exhibit D to the Complaint—R. 41.

(4) On April 21, 1944, the Honorable Sixth Circuit Court of Appeals affirmed by its judgment, the dismissal by the District Court of the case at bar (so removed from the State Court) on the ground, in effect, that the two prior decisions of dismissal (of the suits involving the issue of illegality under Acts of Congress of the sale of the assets) were *res adjudicata* of the complaint in the case at bar for simple accounting under an admittedly valid sales contract —to be construed solely by the Michigan State law where it was made and partially performed.

(5) Plaintiffs respectfully submit, therefore, that when—

(a) In the first suit—the defendants, purchaser Bank and the Receiver of the selling closed Bank, defeated an accounting of profits—on the sole ground

that no prior demand on the Receiver had been made to bring suit—that afterwards when proper demand was made—

they are estopped to defeat further actions for accountings of profits by the purchaser Bank—either as in the second suit—on the ground the Plaintiffs must tell the Receiver how to bring suit (when the books and records are all in his possession and plaintiffs have been repeatedly denied the right of inspection)—

or, as in the third suit, at bar, removed from the State Court—when Plaintiffs' complaint raises no issue of illegality of a sale contract under Acts of Congress (as in the first two cases) but admitting a legal sale—asks that rights of accountings of profits given by the sales contract—be enforced in the State Court against the resident National Bank of Detroit, which purchased the assets and agreed to make accountings of profits—and then admits, by motions to dismiss, it never did so.

SUMMARY OUTLINE OF FACTS

(1) A Derivative (class) suit for an accounting of profits was filed in the Michigan State Equity Court against the National Bank of Detroit, a resident of Michigan, as purchaser of certain assets from the Conservator of the closed First National Bank-Detroit.

The Contract of sale dated April 12th, 1933 (R. 25) expressly required that all purchased assets (bonds, notes and bills receivable and real estate mortgages) be sold by the Purchaser Bank prior to November 30, 1933—and all profits accounted for and paid over to the Conservator—afterwards Receiver of the Closed Bank.

(2) Motions to dismiss admitted such accountings and payments of large profits had never been made.

See paragraphs 7 and 8 of the Complaint, R. 5 to 8.

(3) The contract of sale valued these assets at about $63,000,000, was in ordinary terms, and required performance all within the State of Michigan—where the parties resided. R. 25 to 35.

(4) Plaintiffs' complaint expressly disclaimed all right to any relief "under or based upon any Act of the Congress of the United States",

and took the position that "their claims, interests and rights of action depend, arise and are based upon, under and by virtue of the laws of the State of Michigan and the common law in force in said State." (Complaint, paragraph 34, R. 22, 23.)

(5) Defendant National Bank of Detroit removed the cause to the Federal Court, Eastern District of Michigan on the grounds:

(a) That since the sold assets were in the possession and custody of a Conservator appointed by the Comptroller of the Currency, the "action involves a controversy arising under the laws of the United States. * * *" (Petition, paragraphs 3, 4, R. 45.)

(b) That the action was one "involving the winding up of the affairs of an insolvent National Banking association" (Petition, paragraphs 5 to 8, R. 46).

(c) The action is one of which "the district Courts of the United States are given original jurisdiction." (Petition, paragraph 9, R. 49.)

(6) The Closed First National Bank-Detroit was made a party defendant (under a State Court Rule that in derivative actions the corporation must be made a party) but the complaint expressly stated:

> "No relief is asked against the defendant First National Bank-Detroit, or any of its statutory or other agents, * * *."
>
> (Complaint, Paragraph 35, R. 23.)

(7) The Complaint (paragraph 36, R. 23) also expressly "tendered" any recoveries in the action to defendant closed Bank and its Agents, for the benefit of those entitled thereto, namely, "its depositors and * * * stockholders," and which "last named bank is made a nominal party defendant herein for the reason, among others, that its agents and directors have not and will not bring or attempt to bring this action in its behalf."

(8) The cause was removed to the United States Court (R. 53) and motion made by Plaintiffs to Remand on the principal grounds that:

> (1) It was not an action or suit of a civil nature, at law or in equity, "arising under the Constitution or Laws of the United States." (Motion, paragraph 4th, R. 57.)
>
> (2) It was not an action "for the winding up of the affairs" of a National Banking Association. (Motion, paragraph 7th, R. 57.)

(9) The Motion to Remand was denied (R. 59), a separate appeal taken from the order of denial of remand (R. 115) and affirmed by the Court of Appeals on the ground that the action was "one for the winding up of the affairs" of a National Bank—and thus within the original jurisdic-

tion of the District Court—and was, therefore, removable under Title 28 U. S. C. A., Section 41 (16) and 71.

(See Court of Appeals' Opinion, 142 F. (2d) 528.)

SUMMARY OF OPINIONS AND JUDGMENTS OF THE LOWER COURTS

A. The District Court's Decision—

On the Removal Questions—

1st—That Plaintiff's Complaint correctly stated that the contract of sale required the accountings of profits, the Court saying "there can't be much question about the meaning of the contract involved * * * just a question of requiring a public officer to do that which the law states that he shall do." (R. 104.)

2nd—"So, that leaves us in a position where there can't be any doubt about this being a case involving the winding up of the affairs of a national bank"—and the District Court concluded by saying that:

> "it makes no difference about the residence of the parties, * * * all of those cases come within the first sentence of Section 71 of U. S. C. A. Title 28." (R. 104.)

3rd—*On the merits*, in sustaining the motion to dismiss—

the District Court held the Complaint in the suit at bar—to be similar to the ones dismissed previously in the two suits originally started in the Federal Court—and in which dismissals were affirmed in 117 Fed. (2d) 159, and 129 Fed. (2d) 283, and

therefore, that the subsequent suit at bar—commenced in the State Court and removed—must be also dismissed. See R. 106.

That the two causes were not similar—and that the two prior ones were not *res adjudicata* of the suit at bar is discussed in the Brief in support hereof.

B. The Court of Appeals Decision—

1st—On the Question of Removal—

An examination of the opinion shows the Honorable Court of Appeals thought that the action was "one for the winding up of the affairs" of a National Bank, and was, therefore, within the *original jurisdiction of the Federal Courts,* and thus removable.

Thus, it is submitted, the Court of Appeals fell into error for it said in its opinion that "we think the *Gully case* has no application here."

But the Appellate Court did not attempt at all, in its opinion, to point out any part of the complaint which disclosed an action "arising" under the laws of the United States.

This Court said in its opinion, page 116 of 299 U. S. that:

> "We recur to the test announced in *Puerto Rico v. Russell & Co.*, 288 U. S. 467, 77 L. ed. 903, 53 S. Ct. 447, *supra:* 'The federal nature of the right to be established is decisive—not the source of the authority to establish it.' Here the right to be established is one created by the state. * * *"

In the case at bar—the right to an accounting under the sales contract—is created by the law of the State of Michigan—and not by any Act of Congress.

No construction of any law of Congress has any bearing whatever on the right to accountings of profits under this Sales Contract from a purchaser bank.

The claim of the Receiver of the closed National Bank that he is the authority to file the bill for accounting (as in the case at bar) is a mere matter of defense to be urged in the State Court—and does not present any Federal Question. The Honorable Sixth Circuit Court of Appeals knows this to be so—and so recognized in

Teague v. Brotherhood, 127 Fed. (2d) 53—

for a discussion of which please see Brief in support hereof.

2nd—On the Merits—

the Court of Appeals stated in its opinion that:

> "The complaint sets out no material allegations to differentiate this action from those presented in the preceding cases, and the application of the rules there announced dispose of the instant controversy."

It has been already pointed out that the case at bar is a simple complaint asking a simple accounting on an admitted legal sales contract—all of which is ruled by perfectly simple State law principles.

The first and second cases, above referred to, and originally started in the Federal District Court at Detroit—attacked the validity of the sales contract under the Bank Conservancy Act of 1933 of Congress.

No *res adjudicata* could thereby exist as to the present suit and moreover, that defense arises under State Laws and Common Law principles and is properly for the State Courts of Michigan.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I. The Action at Bar is not a suit of a civil nature, at law or in equity, arising under the Constitution or Laws of the United States—and, therefore, is not removable by the resident defendants, from the Circuit Court for the County of Wayne, Michigan, In Chancery, to the District Court of the United States for the Eastern District of Michigan.

II. The Case at Bar should be remanded to the said State Circuit Court—where it originated.

III. This cause is not subject to dismissal on the ground of *res adjudicata,* by the judgments of dismissal entered in the two causes reported in 117 Fed. (2d) 159 and 129 Fed. (2d) 283 above referred to.

IV. This cause is not subject to dismissal for the reasons assigned by the Honorable Sixth Circuit Court of Appeals in entering its judgment of dismissal of April 21, 1944.

V. The defendants are estopped (by their previous motions to dismiss) to claim that Plaintiffs are not now fully entitled to maintain the accounting action at bar in the Michigan State Court, where it originated.

Wherefore, Your Petitioners pray that a Writ of Certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of

the proceedings of said Court had in the case numbered and entitled on its Docket,

No. 9649

WILLIAM ALFRED LUCKING and
MARGARET HOLMES DAVIS,
Plaintiffs and Appellants,

vs.

FIRST NATIONAL BANK-DETROIT,
a National Banking Corporation, and
NATIONAL BANK OF DETROIT,
a National Banking Corporation,
Defendants and Appellees

to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States; and that the Judgment of April 21, 1944, therein of said United States Circuit Court of Appeals for the Sixth Circuit be reviewed by this Court and for such other and further relief as this Court may deem proper.

WILLIAM ALFRED LUCKING,
Ford Building,
Detroit 26, Michigan,
Attorney for Petitioners.

United States of America

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NATIONAL BANK OF DETROIT, a National Banking Corporation,
Respondents and Defendants Below

BRIEF FOR PETITIONERS, WILLIAM ALFRED LUCKING AND MARGARET HOLMES DAVIS, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The opinion is found in the Certified Record and reported in 142 F. (2d) 528.

II.

JURISDICTION

The date of the Judgment to be reviewed is April 21, 1944, when the judgment of the Sixth Circuit Court of Appeals was entered.

Appellate jurisdiction is based upon Section 344 of Title 28 of U. S. C. A. and the Constitution of the United States.

III.

SPECIFICATION OF ERRORS

The errors in the opinion and judgment of the said Court of Appeals which are relied upon by Petitioners are set out in the statement of "Reasons Relied Upon for Allowance of Writ" in the accompanying petition for Writ of Certiorari.

Petitioners rely upon and will urge before this Court, all of the errors therein assigned.

IV.

TWO MAIN QUESTIONS ARE INVOLVED—

FIRST: Was this Cause removable to the Federal District Court, and was a Remand properly refused?

SECOND: Should the Motions to dismiss have been granted?

V.

BRIEF SUMMARY OF FACTS

1st—The Plaintiffs' complaint is to compel the purchasing (new National Bank of Detroit)—

(a) to account, under the contract of sale of assets of April 12, 1933, and

(b) to pay for an appropriation of the old First National Bank's valuable good will.

2nd—The Plaintiffs' complaint *expressly disclaims any and all right to any relief*, except under the laws of Michigan and the common law in force in Michigan.

3rd—This express disclaimer by plaintiffs, of any and all rights and claims under the Constitution or laws of the United States determines the right of plaintiffs to try this case in the State Courts of Michigan.

Therefore, whether the Plaintiffs have a right of action, or the right to maintain this suit—removed by resident defendants to the United States District Court—must be determined by the State Court where it was started.

Odell v. Farnsworth Company, 250 U. S. 501.

In *Odell v. Farnsworth Company, supra*, this Court said:

> "The party who brings suit is 'master to decide what law he will rely upon' and the allegations of his bill are the evidence, or the expression, of his decision, upon which the courts must act in determining the question of their jurisdiction. *The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22; *Healy v. Sea Gull Specialty Co.*, 237 U. S. 479."

The rule laid down by this Supreme Court is that—Plaintiffs may, and have the absolute right to determine and fix for themselves by their complaint "what law" they will "rely upon."

Consequently—the Complaint controls and determines whether any right or cause of action "arising under" any law of the United States is involved.

Neither an answer nor a motion to dismiss, or a removal petition, or any other pleading or paper can alter this rule.

Gully v. First National Bank, 299 U. S. 109.

4th—No claim is made in this complaint that the contract of sale and transfer of assets to new National Bank of Detroit is invalid.

No claim is made that any law of the United States has any effect whatever upon any right or interest of Plaintiffs or upon any issue or question in the case.

No law of the United States has any bearing upon the construction of this contract of sale of assets.

No right or interest of the Plaintiffs is sustained by one construction of a law of the United States, or denied by another construction of any such law.

5th—No claim is made against the old First National Bank. See paragraph 35 of the bill, R. 23.

This defendant was dismissed by Plaintiffs on February 16, 1943 (R. 60).

6th—Plaintiffs do claim that under the laws of Michigan and the common law in force in Michigan—that the new National Bank of Detroit is estopped to raise any defenses except on the merits.

See paragraph 31 (R. 21) of Plaintiffs' complaint.

7th—On April 20, 1942—the District Court (Hon. Arthur F. Lederle, presiding) denied Plaintiffs' motion to remand (R. 59) and notice of appeal from this order was filed (R. 115) and also from the District Court's order of dismissal. (R. 114.)

8th—The District Court in denying Appellants' motion to remand, was of opinion the bill presented a case of "winding up" of an insolvent bank (within the Dinan case rule) and was, therefore, removable. (R. 101, 104.)

9th—The Plaintiffs' position was that since the Complaint did not raise a Federal Question within the rule of the Gully case (299 U. S. 109) the resident defendants could not remove from the State Court (R. 102).

10th—Plaintiffs' counsel also pointed out (R. 102) to the District Court the distinction between (1) the present complaint filed in the State Court, and (2) two previous complaints filed originally in the Federal District Court, stating:

> "The two previous suits, your Honor involved a contention by the plaintiffs that the contract of sale was invalid as beyond the power of the conservator, having been made before the determination of insolvency and the appointment of a receiver. Those contentions were eliminated from this complaint.
>
> The sole question is an accounting under the contract which the First National Bank, or those interested in it primarily, are entitled to under this contract."

VI.

ARGUMENT ON LAW

Question of Remand

POINT I

The controlling Question is:

Whether the suit (disclosed by the complaint) is one "arising under the Constitution and Laws of the United States"—

within the rule laid down in *Gully v. First National Bank,* 299 U. S. 109?

It is to be observed that—

(a) Not every case which could be originally brought in a United States District Court—can be removed from a State Court.

(b) *Only* a case "arising under" a law of the United States *can be removed by a resident defendant.*

Section 71, of Title 28 of U. S. C. A.

Therefore, since Defendant Banks are residents of Michigan—this cause commenced in the State Court—can only be removed if the Plaintiffs' Complaint presents a claim or right of action—

"arising under" the Constitution or laws of the United States—within the rules laid down in

Gully v. First National Bank, supra.

Turning to the *Gully case* we find:

(1) A National Bank Receiver transferred most of the assets of an insolvent national bank to a newly organized National Bank of the same name.

(2) The Fifth Circuit Court of Appeals held the cause was one "arising under" the laws of the United States—but not one "for winding up" the affairs of the National Bank—

See page 506 of 81 Fed. (2d).

(3) This Court, in its opinion said:

> "Mr. Justice Cardozo delivered the opinion of the Court.
>
> Whether a federal court has jurisdiction of this suit as one arising under the Constitution and laws of the United States is the single question here. • • •
>
> "2. The obligation of the contract being a creation of the state, the question remains whether the plaintiff counts upon a federal right in support of his claim that the contract has been broken. • • •
>
> *Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit.*
>
> • • •
>
> *If there were no federal law permitting the taxation of shares in national banks, a suit to recover such a tax would not be one arising under the Constitution of the United States,* though the bank would have the aid of the Constitution when it came *to its defense.* • • •"

CONCLUSION from the *Gully Case*—

A. The crucial test of removability is whether Plaintiffs' right of action is based on an Act of Congress—which

by one construction of the Act would sustain the claim—and by another construction would defeat the claim.

B. That an Act of Congress might render the State Taxes illegal—and thus, *as a matter of defense,* relieve the new Bank from liability—

did not show a removable cause—"arising under" the laws of the United States.

C. Plaintiffs may decide whether their claims are to be based and depend upon State and Common law. If Appellants' complaint so elects—that puts an end to a resident defendant's right to remove to the Federal Court.

See—

Odell v. Farnsworth, supra.

Summary of Reasons for Remand—

FIRST: To make a cause removable (a) from a State Court, (b) by a resident defendant, (c) the plaintiffs' complaint must show—(d) a case "arising under" a federal law, (e) which requires and means absolutely that—

(1) Plaintiffs' rights might *be sustained* under one construction of such law, or

(2) *be defeated* by another possible construction of such law.

SECOND: The *Gully case* and the case at bar are alike, in that:

(1) In each case an insolvent National Bank Receiver sold assets to a new National Bank—under a contract which—

in the *Gully case* required the Purchaser Bank to pay the old selling Bank's liabilities—and

in the case at bar required the Purchaser Bank to account for the purchased assets.

(2) In the *Gully case* the State Tax Collector sued the Purchaser Bank under the contract (between the Receiver and new Bank) for certain taxes owed by the old Bank.

This Court held that merely because the Purchaser Bank might have successfully defended itself from this assumed (by contract) tax liability—on the ground that the taxes were illegal under the Constitution of the United States or an Act of Congress—

did not make the case removable—as one "arising under" a law of the United States.

(3) *In the case at bar,* the suit is to compel the Purchaser Bank to account under the contract (between the agent conservator and New Bank) for the purchased assets.

That the new Bank might defend itself on the ground that the old Bank's Receiver had the right to bring the suit—does not make the cause removable. This defense it can raise in the State Courts of Michigan.

Thereupon, Plaintiffs can claim an estoppel—as pleaded in their complaint (paragraph 31, R. 21) and the question is one for the State Courts under State and Common Law alone. No Act of Congress has any possible bearing on the subject of an estoppel.

(4) Whether the new Bank—in the case at bar—must or must not account under this sale contract for assets purchased, does not depend upon any kind of a construction of any kind of an Act of Congress.

The decision for or against accounting depends upon the form, terms and construction of the contract itself.

(5) That the "agent's" power to make the sales contract in the case at bar—was given by an Act of Congress—is of no consequence under the Plaintiffs' complaint. The complaint does not deny the validity of the Sales contract—but seeks to enforce an accounting under it—

and this *right to an accounting under the terms of this contract,* does not depend upon any construction of the Act of Congress creating an "agent" called a "conservator," but

the right to an accounting depends solely on the wording and construction of the contract itself.

(6) No Act of Congress gives Plaintiffs, as depositors and stockholders, the right to question the new Bank's misappropriation of the old Bank's good-will—

whether Plaintiffs can recover on such a right of action —for a "Class" of depositors or stockholders, is a State and Common Law Question—and no Act of Congress has any bearing whatever on it.

As was said by this Court in *American Company v. Layne Company,* 241 U. S. 257, 260:

> * * * "But whether it is a wrong or not depends upon the law of the State where the act is done, not upon the patent law, and therefore the suit arises under the law of the State. *A suit arises under the law that creates the cause of action.* The fact that the justification may involve the validity and infringement of a patent is no more material to the question under what law the suit is brought than it would be in an action of contract. * * *"

POINT II

That Plaintiffs' complaint does not show a cause "arising under" and Act of Congress—see

Venner v. R. R., 293 Fed. 373 (6 C. C. A.);
L. & N. R. R. v. Mottley, 211 U. S. 149;
Tennessee v. Bank, 152 U. S. 454;
Thompson v. Oil Company, 62 Fed. (2d) 644 (4 C. C. A.); Cert. denied 292 U. S. 631;
American Nat. Bank v. Ames, 169 Va. 711; Cert. denied 304 U. S. 577;
Askins v. First National Bank, 54 Ga. Appeals, 596.

In the *Venner case, supra,* the Sixth Circuit Court of Appeals said:

> "We consider it well settled that a cause of action does not arise under federal laws, so as to justify removal, unless the plaintiff's right, to enforce which the suit is brought, arises out of and depends upon those laws, so that both in stating and in providing his case he must show that his right to recover stands upon the federal law; and that, even though his complaint may disclose that the case will turn and be ruled by the construction and effect given to some federal law under which defendant is claiming, the federal jurisdiction will fail. * * *"

That a cause presents questions of fact such as estoppel is not sufficient to permit removal.

Germania Co. v. Wisconsin, 119 U. S. 473.

POINT III

A disclaimer by Plaintiffs of any rights under Acts of Congress—is conclusive.

Tennessee v. Union and Planters' Bank, 152 U. S. 454.

In *Tennessee v. Bank, supra,* this Court said:

> "In each of the three cases now before this court, the only right claimed by the plaintiffs is under the law of Tennessee, and they assert no right whatever under the Constitution and laws of the United States. * * * In the third bill, no mention is made of the Constitution or laws of the United States, or of any right claimed under either; and no statement in the petition for removal, or in the demurrer, of the defendant corporation, can supply that want, under the existing act of Congress.
>
> The result is that * * * in the third case, the decree must be reversed, at the cost of the defendants, and the case remanded to the Circuit Court of the United States with directions to remand it to the state court from which it was removed."

CONCLUSIONS from *Tennessee v. Bank, supra,* are:

(a) The Plaintiffs' claims were for general taxes against the Bank "under the general tax act of the State." (Top page 455.)

(b) The Bank's charter expressly excluded all other taxes to be collected from the Bank—except a tax based on one-half of one per cent of the Bank's shares of stock.

(c) The bill asked judgment and set up that the defendant Bank claimed that the Plaintiff State's right of action for general taxes was bad because in conflict with the Federal Constitution which prohibited any State to pass any

law impairing the obligation of a contract—See top page 456.

This Court in ruling the third case not to be removable from the State Court held:

(1) That Plaintiff's pleading must show an action arising under the laws or Constitution of the United States, and which would be sustained by one construction of the Federal Statute or Constitution and defeated by another construction. See page 460.

(2) That—

> * * * "(a cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States;' *Gold Washing Machine Company v. Keyes,* 96 U. S. 199, 203; and 'the question whether a party claims a right under the Constitution or laws of the United States is to be ascertained by the legal construction of its own allegations, and not by the effect attributed to those allegations by the adverse party.' *Central Railroad v. Mills,* 113 U. S. 249, 257."

(3) That the only right of removal, where the defendant was a resident of the State, was when the plaintiff's action was one arising under the Constitution or laws of the United States.

POINT IV

The Sixth Circuit Court of Appeals has recently announced these rules, namely:

That the Complaint's statement of the Cause of Action must show that it is a suit "arising" under the Acts of Congress—and its allegations must be taken as true—for in

Teague v. Brotherhood, 127 Fed. (2d) 53—

it was said:

> "The present suit concededly is based upon private contracts between the appellant and members of his class on the one hand, and the Railroad on the other. The obligation of the contract being a creation of the state, no Federal right supports the appellant's claim that the contract has been broken. *Gully v. First National Bank,* 299 U. S. 109, 57 Sup. Ct. 96, 81 L. Ed. 70, and insofar as the complaint alleges an invasion of the plaintiff's property right to seniority through a secret, discriminatory and conspiratory agreement between the Railroad and the Brotherhood, it sounds *in tort,* and is to be adjudicated upon the applicable common law of the state. It does not raise a Federal question. The mere fact that one of the alleged conspirators comes into existence through the operation of a Federal law does not bring into question either the validity or the interpretation of the statute. *People of Puerto Rico v. Russell & Co.,* 288 U. S. 476, 483, 53 S. Ct. 447, 77 L. Ed. 903. There it was said: 'The federal nature of the right to be established is decisive—and not the source of the authority to establish it.' "

Please note that the quoted portion of the opinion covers the case at bar precisely for—

(a) The obligation of the sales contract of April 12, 1933, was a "creation of the State, no Federal right supports the appellants' claim that the contract has been broken."

(b) The plaintiffs' claim in the case at bar that the defendant, National Bank of Detroit wrongfully, by the stated cause of action, (see paragraphs 12 to 18 of the bill) appropriated the closed Bank's good-will—sounds in tort and as the Sixth Circuit Court of Appeals says in its opinion, "and is to be adjudicated upon the applicable common law of the State. It does not raise a Federal Question."

(c) And that a Bank Receiver was appointed under a Federal Statute "does not bring into question either the validity or the interpretation of the Statute."

Please note that the Court of Appeals cites the *Gully v. National Bank* opinion in 299 U. S. 109 and also that on the same page 55, that Court says:

> "It has long been settled that a suit arises under the Constitution and laws of the United States only when the plaintiff's own statement of his cause of action shows that it is based upon a Federal law, or upon the Constitution. *Louisville & Nashville R. R. v. Mottley,* 211 U. S. 149, 29 S. Ct. 42, 43; 53 L. Ed. 126."

The case of *Louisville, etc. Co. v. Mottley* (211 U. S. 149) is of interest, since it involved a suit under a contract made with the Railroad to enforce a stipulation of the contract for an annual pass, which was invalid under the recent "anti-pass" provisions of the Interstate Commerce Act.

This Court said:

> "There was no diversity of citizenship and it is not and cannot be suggested that there was any ground of jurisdiction, except that the case was a 'suit * * * arising under the Constitution and laws of the United States.' Act of August 13, 1888, c. 866, 25 Stat. 433, 434. It is settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. * * *"

POINT V

Whether the complaint shows a cause of action "for winding up the affairs" of any such (National) Bank—or does not show such an action (see *Hannan v. First National Bank-Detroit,* 31 Fed. Supp. 276) is a matter of no consequence whatever.

Since the defendants are residents of the State of Michigan—the only ground of removal is that the complaint showed a cause of action "arising" under the laws of the United States.

See—*Gully v. National Bank,* 299 U. S. 109.

This is obvious for the Fifth Circuit Court of Appeals (81 Fed. (2d) 502), in determining that the (Gully) cause was removable from the State Court, held:

(1) *It was not removable* on the ground that the action involved a "winding up" of the National Bank, but

(2) *It was removable* on the ground that the action was one "arising under" Federal Statutes.

After the Fifth Circuit Court of Appeals had sustained the jurisdiction of the Federal Court in the removal from the State Court—

this Court reversed—and held no jurisdiction on the ground that no Federal Question was involved—*and ordered the cause remanded to the State Court.*

Obviously, had the contention of the defendant Bank that the *other ground* of removal (namely a case involving the "winding up" of a National Bank) been a good ground of removal—then this Court would not have ordered the case remanded to the State Court—*without first deciding the other claimed ground of a "winding up" on the merits.*

POINT VI

The Resident Defendants' Petition for removal—filed in the State Court—and verified on April 28, 1942, is found on pages 44 to 51 of the Record.

The petition for removal makes no pretense of claiming or showing that the plaintiffs' cause of action in the present complaint is based upon any Federal Statute—one construction of which would sustain the right of action and another construction of which would defeat the action—as is required by the rule set forth in *Gully v. National Bank*, 299 U. S. 109.

POINT VII

Summary of Petitioners' Petition on Remand Question.

It is respectfully submitted:

1st—Plaintiffs have the absolute right to so draw their complaint that it does not present or show any right or cause of action "arising under" an Act of Congress.

2nd—The complaint does not show any "cause arising" under the Federal Constitution or the Acts of Congress.

3rd—If the petitions for removal (or other papers gotten up by defendants) attempt to show a defense under some Act of Congress—it does not make a case for removal—such defenses must be submitted to the State Court where the action was commenced.

4th—Even though the defendants may claim because a receiver is acting for the defendant—First National Bank-Detroit, (now dismissed from the case by Plaintiffs) that

this makes the cause one of "winding up" a National Bank, no removal could be had from the State Court unless Plaintiffs' complaint shows *his action* arises under an Act of Congress—within the rules of *Gully v. First National Bank,* 299 U. S. 109—

for the defendants are residents of Michigan and the removal Statute of Congress *gives resident defendants only one right of removal,* namely, that Plaintiffs' action is one "arising under" an Act of Congress or the Federal Constitution.

5th—The accountings are asked under—

(a) the contract of sale of assets—for profits derived by the purchaser bank—*for which the contract required it to account,* and

(b) the acts of the purchaser, which appropriated the old Bank's good-will for nothing.

What Federal Statute then does plaintiffs' complaint rely upon—the construction of which in one way gives Plaintiffs a cause of action—and

the construction of which the other way—denies Plaintiffs a right of action?

The answer is obviously—there is none.

But—that defendant purchaser Bank could or should interpose a defense that such and such an Act of Congress gave the Conservator and Receiver

(a) the right to give away the good-will, or

(b) to waive the accounts for profits or assets sold—

does not make a case of removal—and is not one where the complaint shows an action "arising under" an Act of Congress.

6th—A mere reading of the Federal Judicial Code, 28 U. S. C. A. Section 41, Sub. (1) and 28 U. S. C. A. Sec. 71, shows that only cases against *residents* of a state may be removed from the State Courts—if they are "arising under" a Federal Statute or the Federal Constitution—within the rule of the *Gully case,* in 299 U. S. 109.

The original jurisdiction Statute, Sec. 41, *supra,* covering suits which may be started originally in the District Courts of the United States provides in perfectly clear language that such original suits must be—

(a) brought by the United States or an officer thereof—

(b) or between citizens of same state claiming lands under grants from different states,

(c) or where more than $3000 is involved, and

(1) "arises under" Federal Law or constitution, or

(2) between citizens of different states, provided the condition of amount involved shall not be applied to any of the suits "mentioned in succeeding paragraphs of this section."

NOTE: One of such "succeeding paragraphs" (16) specifies cases for "winding up" of National Banks.

The Removal Statute, Section 71, *supra,* is also perfectly clear that—no action *against residents* of a State can be removed unless it is one

(a) "arising under the Constitution or laws of the United States" of which the District Courts have original jurisdiction—but

(b) if the defendants are *non-residents* of the State where sued they may remove to the Federal Court in "any other suit of a *civil nature,* of which the United States Courts had *jurisdiction.*"

FIRST: Therefore, it is perfectly obvious that if the defendants in this case (removed from the State Courts) were *non-residents* of Michigan—then they would be entitled to argue the question whether the case at bar was one, which arises "in the winding up" of a National Bank.

SECOND: But the defendants being *residents of Michigan—they may only remove*—if the case is one "arising under" Federal Law or Federal Constitution within the *Gully v. Bank,* 299 U. S. 109 rule—above more fully discussed.

It appears decisive that defendant *residents of Michigan* cannot remove this case—under the ruling of—

Western Union Co. v. R. R. Co., 178 U. S. 239,

which reversed the Sixth Circuit Court of Appeals and ordered the cause remanded to the State Courts of Michigan.

This Court said, in its opinion by Mr. Justice Fuller:

> "Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.
>
> The Western Union Telegraph Company might have instituted its suit in the Circuit Court, but it sought the state tribunals as it had the right to do, and the defendant could not remove the case on the ground of diverse citizenship, although that fact existed, because it was itself a resident of the state. Defendant's application to remove, therefore, was based on the averment that the suit arose, 'under the Constitution and laws of the United States.'

Whether it did so arise depended on complainant's statement of its own case. *Tennessee v. Bank,* 152 U. S. 454.

* * *

The bill was in legal effect a bill for the specific performance of the contract set up in the pleadings, and the prayer was for injunction against interference with complainant's alleged rights, and that defendant allow complainant to reconnect its said wires, and use them in the same way as before they were disturbed by defendant, 'and that defendant be required to carry out said contract in good faith,' and for general relief. * * *"

POINT VIII

Conclusion of Brief on Remand Question.

I. Suits under contracts (made by receivers with purchaser of assets of insolvent banks) against the purchasers to enforce the contracts have been held not to be suits for "winding up" of the affairs of a National Bank.

See—

American National Bank v. Kate Walker Ames, et al., 169 Va. 711; Cert. denied 304 U. S. 577;

and see—

Gully v. Bank, 81 Fed. (2d) 504 (5 C. C. A.),

reversed by this Court in 299 U. S. 109, on ground that—

(1) No Federal Question was involved and therefore, case *must be remanded to the State Court,* and

since a mere reading of Section 71 of Title 28 of U. S. C. A. shows that

(2) A "winding up" suit *is not removable by a resident defendant*—no decision at all of that question was made by this Court before it ordered a remand to the State Court.

II. Section 71 of Title 28 of U. S. C. A. expressly gives a right of removal from the State Courts *to resident defendants only,* when the plaintiff's complaint shows a Federal Question involved, within the rules of *Gully v. National Bank* in 299 U. S. 109.

To the same effect see—

Venner v. R. R., 293 Fed. 373 (6 C. C. A.);
Tennessee v. Bank, 152 U. S. 454 at page 462.

III. That the contract of April 12, 1933, Exhibit A, had its source in an Act of a Conservator, as appears from Exhibit A does not show or disclose a Federal Question to be involved.

Teague v. Brotherhood, 127 Fed. (2d) 53 (6 C. C. A.).

IV. The only right of removal the defendant, National Bank of Detroit has in the case at bar is that Plaintiffs' complaint discloses an action "arising under" a Federal Statute.

Western Union Co. v. R. R. Co., 178 U. S. 239 (reversing 6 C. C. A.).

V. Since plaintiffs expressly disclaim any rights under a Federal Statute—and limit their rights of action (see paragraph 34 of this bill) to the State Statutes

and the common law in force in Michigan (see Teague case, *supra,* 6 C. C. A.) it follows that the disclaimer is conclusive.

Odell v. Farnsworth Co., 250 U. S. 501.

VI. As to the *Dinan case* opinion in 117 Fed. (2d) 459 (6 C. C. A.) it appears the point that a resident defendant cannot remove from the State Court unless a Federal Question is involved (under the Gully case rule) was not raised or decided by the Court of Appeals.

Moreover, certiorari was granted by this Court (314 U. S. 593) *and before the case got to this Court for final argument*—settlement was made to the Plaintiffs Dinan by the Defendant Receiver Schram (as petitioners are informed) after which the certiorari granted by this Court was dismissed on the petition of the Dinans—see 315 U. S. 824.

The other two decisions cited by the Court of Appeals in its opinion, namely:

Toledo etc. Co. v. Lyons, 290 Fed. 637, and
International Co. v. Weeks, 203 U. S. 364,

were not removal cases at all.

VII. One of the Plaintiffs is a resident of Michigan. Both the defendants (one was dismissed) are residents of Michigan. The Receiver is not a party at all.

The Plaintiffs could not have commenced this suit in the United States Court—there not being the requisite diversity of citizenship and the complaint not showing a Federal Question within the rule of *Gully v. Bank, supra.*

That being so—no right of removal existed—see

Armstrong v. Trust Company, 126 Fed. (2d) 164 (5 C. C. A.).

When the two previous cases brought by Plaintiffs (117 Fed. (2d) 159 and 129 Fed. (2d) 283) were commenced in the Lower Federal Court, jurisdiction existed there because it was claimed in Plaintiffs' complaints that by the proper interpretation of the Bank Conservator's Act of Congress, the sale of assets to the defendant National Bank of Detroit was invalid, (having been made before a finding of insolvency by the Comptroller) and because Federal officers were made defendants in those two cases.

Thus, a Federal question within the rule of *Gully v. First National Bank, supra,* appeared and the District Court had original jurisdiction, but no Federal Question is found in the present complaint.

POINT IX

The Dismissal on the Merits.

If this Honorable Court should reach this Second Question—not being of the opinion that Petitioners are entitled to the Writ on the Question of Jurisdiction—then Petitioners respectfully submit that a mere cursory reading of the Complaint—admitted by the motions to dismiss—shows an obvious case for an accounting of profits.

Moreover, Judge Hiram Church Ford, Senior District Judge of the Sixth Circuit, held this complaint for accounting sufficient.

He said (R. 41) that—

> "I am rather inclined to think that the complaint is sufficient to disclose an accounting called for on a charge that no accounting within the terms of the contract has been made."
>
> "My idea is that for the present this case must be dismissed for failure of the complainants to make appropriate demand in advance of undertaking to usurp the position of the Receiver. * * *"

Plaintiffs having made the demand required of them by Judge Ford in the first case—see Exhibit B, R. 37 attached to the complaint in the case at bar—

the defendant Purchaser Bank is, upon most familiar Principles, estopped to now claim Plaintiffs are not entitled to an accounting (as so held by Judge Ford in the first case) since they complied with the prerequisite to suit, the defendants there interposed.

And all such questions—both affecting the right to recovery under the sales contract, the right to appear as class plaintiffs and all defensive rights are all properly for the State Courts of Michigan where this cause originated and where it is still pending—unless this Honorable Supreme Court should upon review of the Court of Appeals' Judgment of April 21, 1944, *determine that resident defendants can remove State Court cases to the Federal Courts—when no Federal Question, at all, is raised by the complaint.*

Respectfully submitted,

WILLIAM ALFRED LUCKING,
Ford Building,
Detroit 26, Michigan,
Attorney for Petitioners.

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United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1944

No. 266

WILLIAM ALFRED LUCKING and
MARGARET HOLMES DAVIS,
Petitioners,
vs.
FIRST NATIONAL BANK-DETROIT,
a National Banking Association, and
NATIONAL BANK OF DETROIT,
a National Bank Association,
Respondents

BRIEF OF RESPONDENT, FIRST NATIONAL BANK-DETROIT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

ROBERT S. MARX,
FRANK E. WOOD,
Attorneys for Respondent, First National Bank-Detroit,

NICHOLS, WOOD, MARX & GINTER,
Of Counsel,
900 Traction Building,
Cincinnati 2, Ohio.

Interstate Brief & Record Co., Case Bldg., 457 Fort St. W., Detroit 26, Mich.

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BRIEF OF RESPONDENT, FIRST NATIONAL BANK-DETROIT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

RESPONDENTS' COUNTER-STATEMENT

This is a derivative class action instituted by the plaintiffs-petitioners in the State Court for the State of Michigan on behalf of themselves and all other stockholders and depositors of First National Bank-Detroit, an insolvent national banking association (R. p. 2). The action was

removed from the State Court to the Federal District Court for the Eastern District of Michigan, Southern Division, by both of the defendants-respondents (R. p. 44).

After removal, both defendants-respondents filed their separate motions to dismiss on the principal ground that the complaint failed to allege a proper demand by the plaintiffs-petitioners upon the Receiver of First National Bank-Detroit to institute the action, and an improper or unreasonable refusal on his part to do so (R. pp. 61, 80). The plaintiffs-petitioners thereupon filed their motion to remand the case to the State Court (R. p. 56).

The motion to remand and the motions to dismiss were heard together. The motion to remand was denied, and the motions to dismiss were granted (R. pp. 59, 111).

On appeal to the Circuit Court of Appeals for the Sixth Circuit, the orders of the District Court were affirmed by an order entered on April 21, 1944 (R. p. 129). The opinion of the Circuit Court of Appeals is found on pages 130 and 131 of the printed record and in *Lucking v. First National Bank-Detroit,* 142 F. (2d) 528. The application for ceriorari is to review this order of the Circuit Court of Appeals.

As noted by petitioners on page 5 of their petition and by the Circuit Court of Appeals in its opinion (R. 130), this is the third case of the same character instituted by the same plaintiffs against the same defendants. Both of the earlier cases were originally instituted in the Federal District Court for the Eastern District of Michigan, were dismissed on motion and the dismissal affirmed by the Sixth Circuit Court of Appeals. The opinions of the Circuit Court of Appeals are both reported under the title of *Lucking v. Delano,* and are found in 117 F. (2d) 159 and 129 F. (2d) 283.

Mr. William Alfred Lucking is both one of the petitioners herein and also the attorney for the petitioners. Since the First National Bank-Detroit closed its doors on February 11, 1933, Mr. Lucking has beleaguered the Receiver and the Bank with a deluge of litigation, of which the three cases referred to herein are but a small part.* In the second of the series of three cases of which this is one, *Lucking v. Delano*, 129 F. (2d) 283, and in the instant case neither Mr. Lucking, nor any other counsel, appeared before the United States Circuit Court of Appeals in either instance to argue on behalf of the complainants.

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*Some of the other litigation instituted by Lucking against the First National Bank-Detroit, or its Receiver, and determined unfavorably to Mr. Lucking is as follows:

Lucking v. Delano, Comptroller of the Currency, 122 Fed. (2d) 21 (C. C. A. for D. C.);

Lucking v. Schram, Receiver, First National Bank-Detroit, 117 Fed. (2d) 160;

Barbour v. Thomas, Receiver, First National Bank-Detroit, 7 Fed. Supp. 271, affirmed 86 Fed. (2d) 510, cert. denied 300 U. S. 670;

Ullrich v. Thomas, Receiver, First National Bank-Detroit, 86 Fed. (2d) 678, cert. denied 301 U. S. 692;

Brabb v. Thomas, Receiver, First National Bank-Detroit, 6167 In Equity, U. S. D. C. E. D. Mich.;

Wolf v. Schram, Receiver, First National Bank-Detroit, 111 Fed. (2d) 146, cert. denied 311 U. S. 651;

Davis v. Schram, Receiver, First National Bank-Detroit, 111 Fed. (2d) 144, cert. denied 311 U. S. 651;

Knapp v. Detroit Trust Co., et al., In Equity 8268, U. S. D. C. E. D. Mich.;

Cleveland v. First National Bank-Detroit, 606 U. S. D. C. E. D. Mich.;

Cleveland v. Delano, 2994 U. S. D. C. for the District of Columbia.

For a comprehensive summary of the Lucking litigation, see the opinion of the United States Circuit Court of Appeals for the District of Columbia in *Lucking v. Delano, Comptroller of the Currency*, 122 Fed. (2d) 21.

The bills of complaint in all three cases closely resemble each other. As a matter of fact, the complaint in the instant case, with a few minor exceptions, is verbatim identical with the complaint in the second Lucking case (129 F. (2d) 283) referred to above.

The petitioners herein are identical with the petitioners in the two prior cases above mentioned. In both prior suits the petitioners voluntarily instituted both of the complaints in the Federal courts, and solemnly represented therein to the Court that the Federal courts had proper jurisdiction over said controversies. In both of said previous cases the jurisdiction of the Federal courts was upheld and the complaints dismissed. Now in a final effort to circumvent these prior adjudications of the same controversies as involved herein, petitioners have filed a bill of complaint, which, as stated above, is almost verbatim identical with that of the second suit. And now petitioners just as solemnly represent to this Court that the Federal courts do not have jurisdiction over such an alleged cause of action. The purpose of petitioners is obvious.

All three cases center about a contract for the sale of approximately $105,000,000.00 worth of assets of the closed and insolvent First National Bank-Detroit in April 1933 to the newly organized National Bank of Detroit (R. p. 25). The instant suit, like the two previous ones, is brought as a derivative or class action allegedly on behalf of the creditors, depositors and shareholders of the insolvent First National Bank-Detroit to recover from the National Bank of Detroit for their benefit, the alleged good-will of the insolvent First National Bank-Detroit, which it is claimed was transferred to the new bank without consideration (R. pp. 23-24). Both of the prior suits, *Lucking v. Delano, supra,* were dismisset by the Sixth Circuit Court of

Appeals for failure of the complainants to show a proper demand upon the Receiver of the bank to bring action against the National Bank of Detroit, and because of the complainants' failure to show any unreasonable refusal upon the part of said Receiver to do so.

In an attempt to avoid the effect of these two earlier decisions of the Sixth Circuit Court of Appeals, the petitioners herein are merely endeavoring to obtain a third trial on the same issues by instituting the third complaint in the State Court. By stating in their third bill of complaint that they seek relief solely under the laws of Michigan, and not under the Federal laws, petitioners hope to render the case non-removable, and thereby by-pass the two prior Federal decisions above referred to.

This entire situation was well recognized by the Sixth Circuit Court of Appeals in the instant case, wherein it stated in its opinion (R. 131):

> **"The complaint sets out no material allegations to differentiate this action from those presented in the preceding cases, and the application of the rules there announced dispose of the instant controversy."**

ARGUMENT

THE WITHIN CASE IS PROPERLY REMOVABLE TO THE FEDERAL COURT

It is conceded by all parties that this is a derivative or secondary class action. It is brought by the petitioners to collect and obtain an accounting from the National Bank of Detroit with respect to a claimed asset of the closed and insolvent First National Bank-Detroit. Any recovery that might be effected would be for the benefit of all creditors, depositors and shareholders of the closed bank.

Under and by virtue of the National Banking Act, and particularly Sections 191 and 192 of Title 12 U.S.C., all assets of an insolvent national bank vest solely and exclusively in a receiver appointed therefor by the Comptroller of the Currency of the United States. Since such receiver is the only person, who, under the National Banking Act, in the first instance has the right to enforce such a cause of action as forms the subject matter of petitioners' complaint herein, and since such an action if brought by the receiver would obviously be one for winding up the affairs of an insolvent national bank, it must inevitably follow that a derivative action such as is presented herein must be brought for the benefit of the receiver of the closed bank because of his alleged refusal to act and, therefore, necessarily and inherently becomes an action for winding up the affairs of an insolvent national bank and is removable to the Federal Court.

The law is well established that the corporation, in whose name and for whose benefit a derivative or secondary class is brought, is not only a necessary but an indispensable party to such litigation. Furthermore, the

corporation in such a derivative action, although named as the defendant, is in reality the plaintiff.

See: *Davenport v. Dows,* 18 Wall. 626, 21 L. Ed. 938;
Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827.

It has long been established that the National Banking Act establishes a complete and exclusive statutory system for the establishment and government of national banks and for the administration of the liquidation of insolvent national banks.

Cook County National Bank v. U. S., 107 U. S. 445, 27 L. Ed. 537;
Davis v. Elmira Svgs. Bank, 161 U. S. 275, 40 L. Ed. 700;
Dietrick v. Greaney, 309 U. S. 190, 84 L. Ed. 694.

It is also the clearly established law that a receiver appointed by the Comptroller of the Currency to wind up the affairs of an insolvent national bank is the sole legal representative of the bank, and all of its creditors and shareholders. He is the only agent empowered by law to appear and act for the bank or its creditors and shareholders.

Bank of Bethel v. Pahquioque Bank, 14 Wall. 383, 20 L. Ed. 840;
Grindley v. First National Bank-Detroit, 87 F. (2d) 110, (C.C.A. 6th).

Since the within cause is a derative action, since the First National Bank-Detroit is not only an indispensable party to such an action but is the real party plaintiff, and since the receiver is the only agent or officer authorized to act for an insolvent national bank, it must follow that the within action is one for winding up the affairs of an insolvent national bank and hence removable to the

Federal Court. Whether an action involves the winding up of the affairs of a national bank depends not upon whether the receiver is or is not a defendant, but rests upon the allegations as they appear upon the face of the complaint. See *Dinan v. First National Bank-Detroit,* 117 F. (2d) 459, 460. Here too, the face of the complaint clearly reveals the within cause to be one for winding up the affairs of an insolvent national bank. Here the very controversy arose out of a contract for the sale of assets of the closed bank to a newly organized bank for the purpose of obtaining cash to make a pay-off to depositors of an insolvent bank. It would be difficult to imagine a controversy that more closely affected the winding up of the affairs of an insolvent national bank.

Finally, since an action which involves the winding up of the affairs of an insolvent national bank is an action arising under the laws of the United States, it is clearly removable to this Court under Sections 24 and 28 of the Judicial Code, as amended, and particularly sub-section 16 of Section 24 (U.S.C., Title 28, Sections 41 and 71).

Wichita Royalty Co. v. City National Bank, 95 F. (2d) 671, 674, (C.C.A. 5th);

Fleming v. Gamble, 37 F. (2d) 72 (C.C.A. 10th);

Fash v. First National Bank, 80 F. (2d) 110 (C.C.A. 10th);

Lawrence National Bank v. Rice, 83 F. (2d) 642 (C.C.A. 10th);

Dinan v. First National Bank, 117 F. (2d) 459 (C.C.A. 6th);

Guarantee Co. of North Dakota v. Hanway, 104 F. 369 (C. C. A. 8th);

McDonald v. State of Nebraska, 101 Fed. 171 (C. C. A. 8th).

THE GULLY CASE

A great deal of consideration is devoted by counsel for the petitioners to the case of *Gully v. First National Bank,* 81 F. (2d) 502; reversed in 299 U. S. 109, 81 L. Ed. 70, 57 Sup. Ct. 96.

The facts in the *Gully* case are rather simple. Certain state taxes had been levied against the shares of the First National Bank *of* Meridian prior to its failure. After the bank became insolvent and a receiver had been appointed, its assets were transferred to a new bank known as the First National Bank *in* Meridian. The new bank, in addition to other considerations for the purchase price, assumed all of the debts of the old bank. An action was brought by the tax collector of the State of Mississippi against the new bank to collect the taxes which had been levied against the stock of the old bank.

The suit was started in the State courts of Mississippi and a removal was sought to the Federal Courts upon two grounds: *first,* that the suit arose under the laws of the United States since the levy of a tax on shares of a national bank is possible only because of the express permission of a federal statute; and, *second,* that the suit was one for winding up the affairs of a national bank.

The Fifth Circuit Court of Appeals in the decision reported in 81 F. (2d) 502, held that although the case was not one for the winding up of the affairs of a national bank and hence was not removable on the second ground, it was properly removed on the first ground.

This Court held that since the plaintiff had injected no federal question into the case the same could not be introduced by the defendant, and hence the case was held not removable. The decision of the Sixth Circuit Court of Appeals is not in conflict with the *Gully* case and the *Gully*

case can be clearly distinguished from the instant case on at least two grounds: *First,* the cause of action which the Tax Collector sought to enforce in the *Gully* case was not one belonging to the insolvent bank or its receiver. It was not a derivative action brought on behalf of the closed bank or for the benefit of its stockholders and creditors. It was clearly an action by a third party to enforce a claim belonging only to that third party, which, if successful, would inure only to the benefit of said third party and did not, therefore, involve the winding up of the affairs of an insolvent national bank.

In the second place, on certiorari to this Court, the only point presented was whether the Fifth Circuit Court of Appeals had erred in holding the case removable as arising under the laws of the United States because of the federal statute granting to the several states the power to tax the shares of a national bank. The question of whether the cause involved the winding up of a national bank and was removable as such was not before this Court.

OTHER ARGUMENTS OF PETITIONERS RELATING TO REMOVABILITY OF SUIT

Petitioners also confusedly argue that the within cause is not properly removable because the defendants are residents of Michigan, and petitioners argue that only non-residents can remove such a controversy as is herein involved. Obviously, petitioners have misread Section 28 of the Judicial Code. The first sentence of said section relates to actions arising under the laws of the United States such as one for winding up the affairs of a national bank, and is not related to either the citizenship or the residence of the parties. The second sentence in said section of the Judicial Code, which requires non-residents as a prerequisite to removal, relates solely to suits other than those arising

under the laws of the United States and is generally referred to as applying to cases arising where there is a diversity of citizenship.

Petitioners also set forth the well known rule that the plaintiff may state his own cause and may determine upon what law he bases his right of recovery. Such cases as *Odell v. Farnsworth,* 250 U. S. 501, 63 L. Ed. 1111 and 1113, and others are cited in support of the proposition that since the petitioners have by their own complaint relinquished any claim to any recovery under federal law, the instant case is not one for winding up the affairs of a national bank and does not arise under the laws of the United States. The simple answer to this is that petitioners have overlooked that their case is framed as a derivative action and that whether they like it or not their action basically is one to recover a claimed asset of a closed national bank and hence arises under the laws of the United States. Therefore, respondent submits that the case is clearly removable to the federal court.

PETITIONERS' COMPLAINT WAS PROPERLY DISMISSED

The claim of petitioners has been before the federal courts three times. Three times the complaints have been dismissed by the District Court for failure of the complainants to show a proper demand and refusal upon the part of the receiver of the insolvent bank. Three times the decision of the District Court has been affirmed by the Sixth Circuit Court of Appeals. On the last two hearings before the Circuit Court of Appeals counsel for the petitioners herein did not even bother to appear and argue. The law supporting the dismissal of all three complaints is clearly set forth in the three opinions of the Circuit Court of Appeals, and no authorities are cited by the petitioners herein in support of their position.

CONCLUSION

We, therefore, submit that the petition for a writ of certiorari should be denied for the reasons set forth above.

ROBERT S. MARX,
FRANK E. WOOD,
Attorneys for Respondent, First National Bank-Detroit.

NICHOLS, WOOD, MARX & GINTER,
Of Counsel,
900 Traction Building,
Cincinnati 2, Ohio.

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UNITED STATES OF AMERICA

In the Supreme Court of the United States

OCTOBER TERM, 1944

WILLIAM ALFRED LUCKING and
MARGARET HOLMES DAVIS,
PETITIONERS,

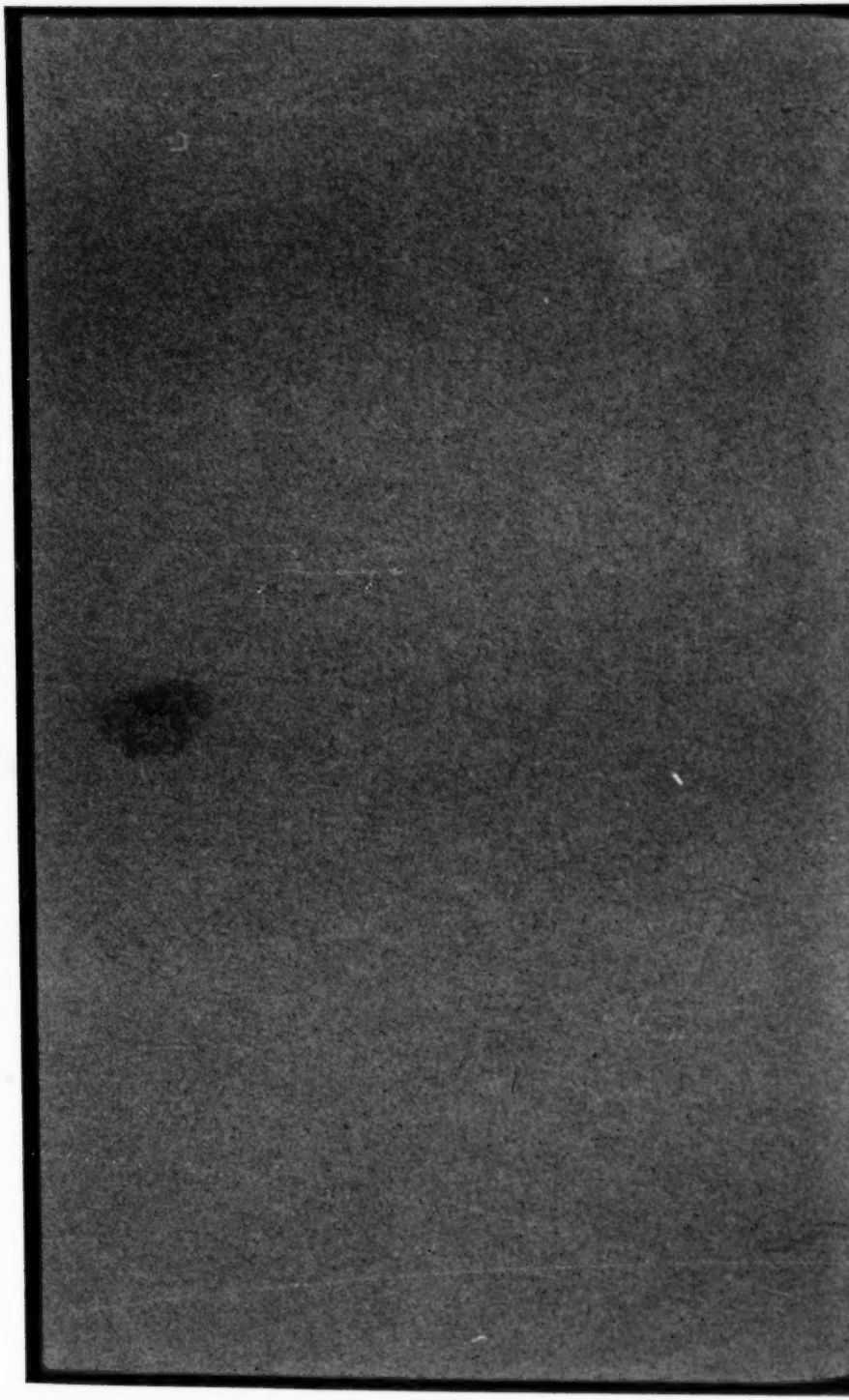
vs.

FIRST NATIONAL BANK-DETROIT,
a national banking association, and
NATIONAL BANK OF DETROIT,
a national banking association,
RESPONDENTS.

BRIEF OF RESPONDENT, NATIONAL BANK OF DETROIT, IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

WILLIAM E. DUNBAR,
E. DONALD WADE,
JOHN G. GAMMERMAN,
Attorneys for Respondent, National Bank of Detroit,
1000 National Bank Building,
Detroit 26, Michigan.

DICKINSON, WORDEN, DAVIS,
McKEAN & CUDLIP,
Of Counsel.



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UNITED STATES OF AMERICA

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a national banking association, and

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BRIEF OF RESPONDENT, NATIONAL BANK OF DETROIT, IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the Sixth Circuit Court of Appeals is found in *Lucking vs. First National Bank-Detroit*, 142 F. (2d) 528.

STATEMENT OF THE CASE

This is a derivative or secondary class suit brought on behalf of the petitioners and all other depositors and stockholders of First National Bank-Detroit, an insolvent national banking association (R. pp. 2, 3). It seeks to attack certain transactions arising out of a contract of April 12, 1933, for the sale of certain assets of First National Bank-

Detroit by its conservator to this respondent. It is the third of a series of cases instituted by the petitioners against the respondents, the first two having been dismissed on motion and the dismissal affirmed by the Sixth Circuit Court of Appeals in *Lucking vs. Delano,* 117 F. (2d) 159 and *Lucking vs. Delano,* 129 F. (2d) 283.

The case is accurately stated and the authorities fully presented in the brief on behalf of respondent, First National Bank-Detroit. It would be supererogation to repeat those matters here. We merely point out certain matters in connection with the position of this respondent which were not covered in the brief of First National Bank-Detroit and certain other factors which we believe pertinent to the application for a writ of certiorari.

As in the two earlier cases, this respondent based its motion to dismiss the complaint in this case, not only upon the failure of the complaint to allege a demand and an unreasonable refusal on the part of the receiver, but also upon the failure to state a claim upon which relief might be granted (R. p. 61). Because of the dismissal for lack of capacity of the petitioners to maintain the suit, no opportunity was afforded to this respondent to argue its motion to dismiss for failure to state a claim (R. pp. 104-106, 109).

As appears, however, from the portion of the opinion of the District Court in the first case (Civil Action 1480) which is attached to the complaint in this case as Exhibit "D" (R. pp. 19, 21, 41), arguments on the failure to state a claim were presented to the District Court by this respondent in the first case. Since only a portion of the District Court's opinion in that regard appears in the printed record in this cause, we have taken the liberty of printing the opinion in the Appendix to this brief.

In the first case (Civil Action 1480) the District Court found that the only claim stated was that this respondent

had not filed certain accountings required by the contract, the exact nature of which was not clear. The District Court was "even a little doubtful about that." The first action, of course, was dismissed solely on the ground of the lack of demand, and this was the only point considered by the Circuit Court of Appeals in that appeal. 117 F. (2d) 159. The receiver in his letter of January 29, 1940, written after this decision of the District Court specifically informed petitioners that all accountings had been filed (R. pp. 84, 90). The second suit as well as the instant case were commenced after the receiver's letter was written and mailed, but the question of the sufficiency of the complaint to state a claim upon which relief might be granted has not again been argued because of the dismissal for failure to show a demand and an unreasonable refusal.

The only new question in this third case is whether the action was properly removed from the State Court to the Federal District Court.

In the complaints in the two earlier cases, both of which were originally instituted in the Federal District Court, petitioners had alleged the jurisdiction of the Federal Court as follows:

> "Jurisdiction of this Honorable Court rests upon (1) requisite amount in controversy, (2) necessary interpretation and application of different Acts of Congress pertaining to a National Bank Conservator's and Receiver's duties, powers and obligations, (3) the winding up of a National Bank, and (4) general equitable principles."

In an attempt to avoid these statements and to prevent the removal of this cause to the Federal courts in order to avoid the effect of the decisions of the Sixth Circuit Court of Appeals in the two earlier cases, the petitioners have made the following changes in their approach:

1. They have joined the closed bank, but not its Re-

ceiver, as a party defendant, and throughout the complaint have studiously attempted to avoid referring to the Receiver of First National Bank-Detroit by describing him as "agent" of the closed bank. However, the contract which they attach to their complaint as the foundation of their suit (R. p. 25), and a myriad of other references in their complaint, disclose that the transactions in question all occurred after the closing of the bank and the assumption of its custody by the Comptroller of the Currency.

2. They have abandoned, so they say, any claim that the original contract upon which they sue is invalid, and content themselves apparently with (a) an alleged "tort" claim for an alleged misappropriation of goodwill, and (b) a demand for an accounting, the nature, purpose and basis of which again are not clear.

3. They have inserted in their complaint a statement that they do not rely on any Federal law, but solely on the Common Law of Michigan (R. pp. 22, 23).

4. At the opening of the oral arguments on the petitioners' motion to remand and the respondents' motions to dismiss, counsel for the petitioners filed a so-called "dismissal" as to the closed bank (R. pp. 60, 95), without regard to the necessity for approval of such dismissal under Rule 23 (c) of the Rules of Civil Procedure for District Courts, and apparently without regard to the fact that the suit, if dismissed as to the closed bank, would fail in its entirety for lack of necessary parties.

The petitioners found no way of getting around the perfectly correct statements in their earlier complaints that this was an action for "the winding up of a National Bank."

ARGUMENT

Petitioners rely principally upon the removal question as the basis of allowance of the writ of certiorari, little attention being devoted to the propriety of the dismissal for lack of demand and an unreasonable refusal by the receiver. In fact in neither of the earlier two cases did the petitioners seek a review by this Court of the ruling of the Circuit Court of Appeals on the latter proposition.

The propriety of the removal is predicated upon two obvious propositions:

1. The action is one for the winding up of an insolvent national bank.

2. An action for the winding up of an insolvent national bank is an action arising under the laws of the United States, and hence may be removed from a State Court to the Federal Court without regard to the residence of the parties.

It is apparent that if there *is* a cause of action, it is the property of the closed bank or its receiver. The establishment or denial of that cause of action, if there is one, will establish or extinguish a valuable property right of the closed bank, and thereby swell or diminish the assets in the hands of the receiver or the Comptroller of the Currency to be administered and distributed pursuant to the National Banking Act. The situation, therefore, is the same as if the receiver were to sue upon a promissory note or to collect another debt or claim belonging to the insolvent bank, the proceeds of which would inure to the benefit of the depositors and stockholders and be distributed to them in accordance with the terms of the National Banking Act. That such a case would be one for the winding up of a national bank, there can be no doubt.

The character of the suit is emphasized by the fact that it arises (if at all) in relation to a sale of the assets of the

closed bank, made by its conservator after its insolvency to provide funds to pay a dividend to depositors (R. pp. 33, 34).

That an action for the winding up of a national bank is one of which the Federal District Courts are given original jurisdiction, there can be no doubt. *International Trust Co. vs. Weeks,* 203 U. S. 364, 366, 51 L. Ed. 224, 27 S. Ct. 69. The statutory grant of that jurisdiction is found in Section 24 of the Judicial Code (U.S.C., Title 28, Section 41) which provides in part:

> "The district courts shall have original jurisdiction as follows:
> * * *
>
> "(16) *Suits against national banking associations.* Sixteenth. Of all cases commenced by the United States, or by direction of an officer thereof, against any national banking associations, *and cases for winding up the affairs of any such bank.* * * *" (Italics ours.)

But the extent of the judicial power of courts of the United States is defined in Section 2 of Article III of the Constitution, the pertinent provisions of which read:

> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

The only clause of the foregoing section under which

federal courts may be given jurisdiction, original or otherwise, over the winding up of the affairs of an insolvent national bank is that relative to "Cases * * * arising under * * * the laws of the United States * * *." It follows that if the federal courts have original jurisdiction over cases for the winding up of national banks, they possess that jurisdiction only because such cases arise under the laws of the United States.

Section 28 of the Judicial Code (U.S.C., Title 28, Section 71) provides for the removal of causes as follows:

> "Any suit of a civil nature, at law or in equity, *arising under the Constitution or laws of the United States*, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction, in any State court, *may be removed by the defendant or defendants* therein *to the district court* of the United States for the proper district. Any *other* suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being *nonresidents* of that State * * *." (Italics ours.)

Since this is clearly an action for winding up a national bank of which the district courts are given original jurisdiction, and as such is a case arising under the laws of the United States, it is apparent that it is removable under the first sentence of Section 28 of the Judicial Code without regard to the residence of the parties.

The petitioners by their petition in this Court raise only matters of federal law. They have failed to demonstrate in any manner that the decision of the Circuit Court of Appeals which they desire to have reviewed by this Court, in any manner conflicts with the decision of any other Circuit Court of Appeals or of this Court. They likewise

have failed in any manner to demonstrate that the decision of the Circuit Court of Appeals involves an important question of federal law which has not been but should be decided by this Court, since the principles involved have been established by a long series of cases.

It is respectfully submitted that the application for the writ should be denied.

Respectfully submitted,

WILLIAM B. CUDLIP,
T. DONALD WADE,
JOHN G. GARLINGHOUSE,
Attorneys for Respondent, National Bank of Detroit,
1390 National Bank Building.
Detroit 26, Michigan.

DICKINSON, WRIGHT, DAVIS, MCKEAN & CUDLIP,
Of Counsel.

APPENDIX

Opinion of the Federal District Court in *Lucking vs. Delano*—United States District Court for the Eastern District of Michigan, Southern Division, Civil Action No. 1480—Sixth Circuit Court of Appeals Docket No. 8585, *Lucking vs. Delano*, 117 F. (2d) 159.

"The Court: Now, on the motion to dismiss, on the question of the sufficiency of the allegations of the complaint, I think, perhaps, however much I might feel inclined to agree with the position of the National Bank that the contract is valid, that it was not made without power to make it, and that the approval is a nullity because of lack of notice, and that the claim that the stockholders or depositors did not understand it because it was ambiguous, that it was not of such a nature as to be an approval of the contract—I say, however clear that position may be, it seems to me that there may be enough in the complaints as amended to show that the plaintiffs or complainants have stated a case for an accounting. I am even a little doubtful about that, and if the case were at a point where that were necessary, I would certainly require him to recast his pleadings and state in short, concise words, what sort of an accounting he wants, what sort of an accounting has not taken place, so that we could see what it is.

"I am perfectly convinced, and I think perhaps in fairness to all of you I ought to say so, that there is no invalidity in this contract, and that there is no lacking of power in the comptroller or conservator to make it; and under the circumstances disclosed by the pleadings, by the petition and complaint here, apparently, according to his own pleading, after a reading of the contract, it was not an unwarranted action under the facts. The bank was closed.

"And, I say, of course, as far as I can see, there is no cause of action, no fact upon which relief could be granted

to recover for the taking over of good will. None of the facts here are sufficient to show that the National Bank is obligated to pay the First National Bank something because former directors of the First National Bank came onto the Board of the new bank, or because the conservator deposited funds and checked them out of the new bank, or because it rented the quarters of the old bank and occupied them and paid the rent.

"I find nothing in these pleadings that would warrant any such assertion that that amounted to a buying or agreeing to pay for, even by implication, of any such item as good will of a closed bank.

"I am rather inclined to think that the complaint is sufficient to disclose an accounting called for and a charge that no accounting within the terms of the contract has been made.

"And the rule is, of course, that if there is any relief sought to which the complainant is entitled, why, the motion to dismiss cannot prevail. And, at least, if it were granted upon that basis, leave to amend or requirement of a more definite statement of his claim would be proper.

"It illustrates, I think, very forcefully, the value of the rule that before a depositor or shareholder undertakes to do the litigating that rests upon the Receiver to do in case it is meritorious, he should be required to present his facts and demand that the Receiver do that.

"That rule is of value not only because it is the only way that meritorious litigation can be carried on, but it is a means of preventing a lot of useless and burdensome litigation, burdensome to the courts and to all parties, when a preliminary investigation of the facts upon demand of the Receiver might disclose that it was utterly without basis, especially when a depositor or a shareholder bases most of his allegations on information rather than upon fact.

"He comes in here and says, 'On information, I charge that so and so and so and so.'

"Now, if he presented that information to the Receiver in advance, it is at least possible that the Receiver could dissipate any misinformation that he might have.

"I think to take any action that would result in whittling away that rule would be very dangerous and a very serious matter.

"My idea is that for the present this case must be dismissed for failure of the complainants to make appropriate demand in advance of undertaking to usurp the position of the Receiver.

"And you may prepare an order accordingly.

"I will take no action on the motion to dismiss for lack of sufficiency of statement, except to indicate to you what I said. Maybe a better pleading on another action might put them in a better position to call for an accounting. And, at any rate, one dismissal is enough at a time.

"You may prepare the order, gentlemen."

(35)

FILED
SEP 28 1944
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United States of America
In the

Supreme Court of the United States

No. 266

WILLIAM ALFRED LUCKING and
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Petitioners and Plaintiffs Below,
vs.
FIRST NATIONAL BANK-DETROIT,
a National Banking Corporation, and
NATIONAL BANK OF DETROIT,
a National Banking Corporation,
Respondents and Defendants Below

PETITIONERS' REPLY BRIEF

WILLIAM ALFRED LUCKING,
Attorney for Petitioners,
1603 Ford Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit 26, Mich.

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PETITIONERS' REPLY BRIEF

A.

The Chief Ground urged for Writ of Certiorari

is that the cause was not removable from the State Court, because plaintiffs' complaint did not show a Federal Question Involved, and therefore, the resident

defendants had no right to remove and the judgment of dismissal was without jurisdiction—on the authority of

Gully v. First National Bank, 299 U. S. 109.

B.

Defendant, National Bank of Detroit, one of the *removing resident* defendants—does not argue the question of removability at all—in its brief.

C.

The other *resident* defendant, First National Bank-Detroit (against which no relief was asked—and which was dismissed by Petitioners from the case (R. 60)),

seeks to sustain the District Court's order of April 20, 1943 (R. 59), refusing a remand to the State Court

by claiming that a Federal Question is raised by Petitioners' complaint in the State Court—because

> "their action basically is one to recover a claimed asset of a closed national bank and hence arises under the laws of the United States."
>
> (Resident Defendant's Brief, p. 11)

D.

THE DECISIVE QUESTION—

Is whether *resident* defendants have a Right of Removal in all suits to recover an asset belonging to Creditors of Stockholders of a closed national bank?

To which question petitioners respectfully beg to answer "no"—on the authority of

Puerto Rico v. Russell & Co., 288 U. S. 476;
American National Bank v. Ames, 169 Va. 711, cert. denied 304 U. S. 577.

In *Puerto Rico v. Russell & Co., supra,* this Court found that the plaintiff's right to sue "is derived from federal law" and further that the property assessed was "obtained under federal statute."

(228 U. S. at p. 483)

But this Honorable Court

HELD no Federal Question was involved and that the Cause must be remanded to

"the Insular Court from which it was removed."

And in *American National Bank v. Ames, supra,* there was involved a suit by stockholders of a Closed National Bank for an accounting from a going National Bank, which had "purchased" the assets of the Closed National Bank.

It was held not to be a suit for "winding up" the affairs of a National Bank, further that

the Appointment of a National Bank Receiver by the Comptroller of the Currency did not deprive the State Court of jurisdiction to interpret the contract of the defendant going bank and require an accounting of its sales of purchased assets.

It is very significant that this Court's opinion in the *Gully v. Bank, supra,* in 299 U. S. cites its opinion in *Puerto Rico v. Russell & Co., supra*—as decisive against the presence of a Federal Question.

IN CONCLUSION—

Petitioners respectfully submit that their Complaint asking an accounting from a purchaser, going National Bank, does not, in the remotest way, raise a Federal Question.

The Petitioners' action to recover profits on a re-sale of assets by the *resident* defendant, National Bank of Detroit,

presents a simple State of Michigan Contract accounting question, a decision of which can in no possible way raise a Federal Question.

In *American Co. v. Layne Co.*, 241 U. S. at 260, it was said:

> "A suit arises under the law that creates the cause of action."

It is therefore respectfully Submitted that this Cause was not removable from the State Court

and that no jurisdiction existed in the District Court of the United States to dismiss the Petitioners' accounting action, in which the two defendants, selling and purchasing National Banks, were residents of Michigan.

It is only a non-resident defendant, who may, under the Federal Removal Statute, remove a cause from the State Courts on the ground that it is one for the "winding up" of the affairs of a National Bank.

And in *American National Bank v. Ames, supra,* there was involved precisely the same action as the one at bar—and it was held not to be one for a "winding up" of the affairs of a National Bank.

Most Respectfully Submitted,

WILLIAM ALFRED LUCKING,
Attorney for Petitioners.